SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

NO. 74-1326

INDIANA HARBOR BELT RAILROAD COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
GENERAL AMERICAN TRANSPORTATION CORPORATION and
NORTH AMERICAN CAR CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The decision of the Court of Appeals of which petitioner seeks review involved the careful application of principles which have been approved by this Court on numerous occasions. The Court of Appeals reversed a decision by the District Court which had (1) set aside a report and order of the Interstate Commerce Commission despite a finding that the Commission's decision had a rational basis and was supported by substantial evidence, and (2) made *ab initio* an independent finding regarding the lawfulness of a railroad tariff, although the Commission had not considered or decided that question. In making this latter finding, the District Court decided matters which have uniformly been held to be within the exclusive primary jurisdiction of the Interstate Commerce Commission. Since the decision of the Court of Appeals is clearly correct and

is based on well-established principles of law, the petition for a writ of certiorari should be denied.

The controversy before the Court of Appeals was initiated when the Indiana Harbor Belt Railroad (IHB) filed two suits in the United States District Court for the Northern District of Illinois seeking to collect freight charges on the movement of privately-owned tank cars to and from repair facilities located on the IHB. The IHB based its claims on a new interpretation of a *general* provision in one of its published tariffs (IHB 325-U). IHB claimed that it had previously "unaccountably" failed to bill and collect charges for the movements in question under the provisions of this tariff. The charges sought in the suit covered the three-year period prior to the filing date.

Defendants General American Transportation Corporation and North American Car Corporation denied liability for these charges on the grounds that another tariff to which IHB and all other major railroads were parties (Maurer's Mileage Tariff 7 series) *specifically* required that movements of private cars to and from repair facilities be made without charge. This tariff provision was designed to insure equality of treatment for shippers who provide their own cars and other shippers who use cars furnished by the railroads. Shippers who use railroad-owned cars and those shippers who furnish their own cars pay the same basic freight rates for the movement of their commodities. Since the former do not pay an additional charge for movements to and from repair facilities, the mileage tariff provides for similar movement without charge for privately-owned cars.

Defendants maintained that the charges allegedly due were not only improper as a matter of tariff interpretation, but were unreasonable and unlawful under the Interstate Commerce Act. Defendants also filed counterclaims seeking to recover charges which had mistakenly been paid for similar movements of privately-owned freight cars other than tank cars.

Concurrently with the filing of their answers and counterclaims, defendants moved to stay the court actions and to refer certain issues to the Interstate Commerce Commission. The District Courts granted these motions and framed the following two questions which were to be referred to the Commission:

> "(a) Whether the movements of privately owned cars therein described are subject to the charges which Plaintiff has collected and seeks to collect or whether such movements are subject to rules and regulations which provide that they shall be made without charge;
>
> "(b) If such movements are subject to the charges which Plaintiff has collected and seeks to collect, whether the imposition of such charges on the movements in question is reasonable and lawful under the provisions of the Interstate Commerce Act."

In its final report and order, the Commission concluded that the tariffs required the IHB to make the movements in question without charge. In accordance with the reference order, the Commission did not reach the second question—whether the assessment of charges would be lawful—and expressly refrained from deciding it.*

The IHB then filed a third action in the District Court seeking to set aside the Commission's decision. The District Court first determined that the Commission's interpretation of the tariffs in question was a reasonable one and was supported by substantial evidence. The court proceeded,

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* Neither the Commission nor its hearing examiner considered the question of whether the movement of private cars to and from repair shops without charge would somehow be unlawful. Pursuant to the express and specific terms of the mileage tariff, railroads, including the IHB for the previous fifty years, do not assess charges on these movements. The complaint filed by IHB did not claim or allege that this tariff (to which IHB was an unqualified party) was unlawful, and the order of reference did not, therefore, suggest any such question for consideration by the Commission.

however, to review the Commission's order and "the Items in suit in the larger perspective of their interrelationship to the entire scheme of railroad charges and tariffs" and concluded that the tariffs in question, as interpreted by the Commission, precipitated a violation of the provisions of Section 2 of the Interstate Commerce Act. On the basis of this conclusion, the court refused to enforce the tariff provisions and held that the IHB could collect freight charges on the movements in question.

The United States, the Interstate Commerce Commission and the defendant car companies appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit. In a unanimous decision by a three-judge panel, the Court of Appeals reversed. The court held that "the district court in reaching its decision took into consideration matters not properly before it and that on the issue which was properly before it, the validity of the interpretation by the Commission of the tariff involved, the court erred". With respect to the tariff interpretation question, the Court of Appeals noted "the [district] court conceded that if one were limited to the face of the record alone good judgment could favor either view of the impact of the tariffs upon each other," and then said "with this conclusion we agree and we think that the court should have so limited its consideration of the Commission's order". As to the District Court's finding that the tariffs as interpreted by the Commission resulted in unlawful discrimination, the Court of Appeals said "we are satisfied, in particular, that it was not within the province of the district court, in reviewing the determination of the Commission . . . to consider *ab initio* [this] question . . . for it is settled that primary jurisdiction for determining whether rate charges are discriminatory lies with the Interstate Commerce Commission and not with the courts. *United States* v. *Wabash R.R.*, 321 U.S. 403, 410-411 (1944)."

At the conclusion of its opinion, the Court of Appeals addressed the IHB's claim, not ruled upon by the District

Court, that the Commission's order violated the Fifth Amendment. The Court stated that the IHB "did not make the showing as to its overall operations which was necessary to enable the court to consider such a claim. *Baltimore & Ohio R.R.* v. *United States,* 345 U.S. 146, 150 (1953)."

ARGUMENT

I

THIS COURT HAS UNIFORMLY HELD THAT THE INTERSTATE COMMERCE COMMISSION HAS PRIMARY JURISDICTION TO DETERMINE THE LAWFULNESS OF RAILROAD TARIFFS UNDER SECTION 2 OF THE INTERSTATE COMMERCE ACT.

The principal issue raised by this case is whether the Court of Appeals erred in holding that "it was not within the province of the District Court . . . to consider *ab initio* the question of whether the application of the tariffs, as interpreted by the Commission, would result in unlawful discrimination . . . ." A long and unbroken line of decisions by this Court directly addressing this point establishes beyond question that the Court of Appeals was correct. There is no conflict of authority on this question either in the decisions of this Court or among the Circuit Courts. Accordingly, IHB's petition for writ of certiorari should be denied.

The landmark case in this area is *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426 (1907), involving a suit by a shipper to recover a portion of the freight charges collected by the railroad for shipments of cottonseed. The shipper alleged that the tariff charges were unreasonable and unjust and, therefore, unlawful under the Interstate Commerce Act. The trial court conducted a hearing, concluded that the challenged freight charges were unjust and unreasonable, and entered judgment for the shipper in the amount by which the court determined that the freight rate exceeded a just and reasonable charge. This Court re-

versed, holding that a prior determination by the Interstate Commerce Commission on the lawfulness of the challenged tariffs was a prerequisite to the right to judicial relief. This Court explained its decision in part as follows:

> ". . . if it be that the standard of rates fixed in the mode provided by the statute could be treated . . . by a court and jury as unreasonable, without . . . prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, . . . a shipper might obtain relief [from] a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced.
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> • • •
>
> "Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. . . . Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal, with power, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, if the power was left in courts to grant relief upon the theory that the established rate could be disregarded and be treated as unreasonable. . . ." (204 U.S. at 439-441)

This Court has many times reaffirmed the principle, initially formulated in the *Abilene* case, that the Interstate Commerce Commission has primary jurisdiction to determine the lawfulness of railroad tariffs. *Robinson* v. *Balt. & Ohio R.R.*, 222 U.S. 506 (1912); *Great Northern Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922); *Barringer & Co.* v. *United States*, 319 U.S. 1 (1942); *United States* v. *Wabash R. Co.*, 321 U.S. 403 (1944); Cf. *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963); *United*

States v. *Scrap*, 412 U.S. 669 (1973); and *Atchison, Topeka and Santa Fe* v. *Wichita Board of Trade*, 412 U.S. 800 (1974). In *United States* v. *Wabash R. Co., supra*, for example, a district court had refused to enforce a Commission decision defining a railroad's tariff obligations because of its own conclusion that requiring compliance with the tariff would violate Section 2 of the Interstate Commerce Act. In reversing, this Court said: "In determining whether there is a prohibited unjust discrimination or undue preference, it is for the Commission to say whether . . . the discrimination or preference is unlawful." And after noting that "a reading of the Commission's report and findings makes abundantly clear that it was not concerned with discrimination or preference such as are prohibited by Sections 2 and 3(1)," this Court said "in any case findings of discrimination or undue preference under Sections 2 and 3(1), as we have said, are for the Commission and not the courts" (321 U.S. at 410-413).

The rationale underlying these decisions was succinctly stated by this Court in *Great Northern R. Co.* v. *Merchants Elevator, supra* at 291:

> "To determine what rate, rule, or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

These considerations were fully applicable to the situation before the District Court in connection with the claims of the IHB. Nonetheless, that court ignored the absence of a Commission finding on the lawfulness of the tariffs and undertook to go beyond the record before it, viewing the issues in "the larger perspective of their interrelationships to the entire scheme of railroad charges and tariffs," and ultimately decided that the tariffs in question, as interpreted by the Commission, violated Section 2 of the Interstate Commerce Act. (Petition for Writ of Cert., Appendix B, District Court Opinion, pp. 8a-9a)

The IHB cites only one decision, *United States* v. *Louisiana & P.R.Co.*, 234 U.S. 1 (1914), as support for its claim that a court may set aside a Commission decision when it believes that decision may result in discrimination. The issue in that case, however, was whether certain branch railroad lines, which were owned by lumber companies and were principally used to carry the products of those companies, were common carriers under the Interstate Commerce Act. The Commission had concluded that they were not, and this Court reversed. This reversal was not based on any conclusion regarding discrimination, but solely upon the Court's view that the Commission had misapplied the definition of common carrier in the Interstate Commerce Act. One of the arguments advanced by the Commission in support of its decision was that it was necessary to prevent discrimination, and, in response to this argument, this Court indicated that the decision might also cause discrimination. This Court ultimately concluded, however, that the issue of discrimination was irrelevant because the Commission had full power to prevent any discriminatory practice that might arise.

If the Commission in the case before this Court had considered and decided the Section 2 issue, the District Court would have had authority to review the Commission's resolution of that issue. The Court of Appeals expressly recognized its power to do so. In this case, however, the Section 2 issue was not before the Commission, and the Commission

did not decide it. The Commission instituted its proceeding at the request of the defendants in order to resolve two issues which had been referred to it by the District Court. These two issues were whether the tariffs to which IHB was a party provided for charges on private car repair movements and whether such charges, if applicable, would be lawful. The question of whether movement without charge would be unlawful was never submitted to the Commission, and neither the Commission nor the Hearing Examiner considered or decided it. The Commission emphasized this in its report, stating that "in view of our decision herein, we do not reach any issue with respect to the lawfulness of any tariff". (341 I.C.C. 58, Petition for Writ of Certiorari, p. 48a) At the conclusion of its report, the Commission again stated that "since the switching charge sought to be applied by respondent [IHB] was inapplicable, it is unnecessary to determine whether it was an otherwise lawful charge". (341 I.C.C. 63, Petition for Writ of Certiorari, p. 55a)

II

HAVING FOUND THAT THE COMMISSION'S DECISION WAS SUPPORTED BY SOUND REASONING AND SUBSTANTIAL EVIDENCE, THE COURT OF APPEALS PROPERLY HELD, IN ACCORDANCE WITH THE DECISIONS OF THIS COURT, THAT THE COMMISSION'S INTERPRETATION OF THE TARIFFS SHOULD HAVE BEEN SUSTAINED.

In sustaining the Commission's interpretation of the tariffs in question, the Court of Appeals applied the well-established principle of administrative law that with respect to matters peculiarly within the competence of the Interstate Commerce Commission the courts cannot substitute their judgment for that of the Commission.* *United States* v. *New River Co.*, 265 U.S. 533, 542 (1924); *Georgia*

* The reconciliation of conflicting railroad tariffs is clearly a matter requiring the special expertise of the Commission. *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 65-66, 68 (1956).

Public Service Commission v. *United States*, 283 U.S. 765, 775 (1931); *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 65-66, 68 (1956); *I.C.C.* v. *Martin Bros. Box Co.*, 219 F.2d 811 (9th Cir. 1955), cert. den. 350 U.S. 823; and *United States* v. *North Carolina Granite Corp.*, 288 F.2d 232, 235 (4th Cir. 1961). The Court of Appeals' decision on this issue does not present a novel question of law for this Court or one concerning which the Circuit Courts are in conflict.

In the decision of the District Court which was before the Court of Appeals, the District Court specifically indicated that the Commission's interpretation of the tariffs could not be overturned on the ground that it was not supported by substantial evidence and relied on its finding of a Section 2 violation in setting aside the Commission's decision.

The District Court said:

> ". . . this fact situation—at least explored superficially—is one in which good judgment could favor either contestant.
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> "Once this court finds substantial evidence in support of the Commission's findings, it cannot go further and inquire into the soundness of the Commission's reasoning or the wisdom of the result. Nonetheless, we have a recognized obligation under 5 U.S.C. § 706(2)(A), to set aside agency conclusions found to be otherwise not in accordance with the law. In this instance, we find that the conclusions reached by Division 2 precipitate a violation of Sec. 2 of the Act, which prohibits and declares unlawful any unjust discrimination by a common carrier." (Petition for Writ of Cert., Appendix B, District Court Opinion, pp. 8a, 11a)

With this conclusion of the District Court before it, and having properly concluded that the Section 2 issue could not be resolved in first instance by the courts, the Court of Appeals correctly sustained the Commission's interpretation of the tariffs. The Court of Appeals did not, however, rely solely on the District Court's conclusion that the Com-

mission's decision was supported by substantial evidence. It specifically describes in its opinion the basis for the Commission's interpretation of the tariffs and states its independent approval of that determination.* (Petition for Writ of Cert., Appendix C, Court of Appeals Opinion, pp. 23a-24a)

In support of its petition, the IHB cites as a conflicting authority on the tariff interpretation question the decision by the Seventh Circuit in *National Van Lines, Inc.* v. *United States,* 355 F.2d 326 (1966). That decision, however, is entirely consistent with the Seventh Circuit's decision in the case before this Court. In *National Van Lines,* the court held that a tariff in which a standard footnote had been inadvertently omitted should be interpreted in accordance with the drafters' intentions, i.e., with the footnote implied, and not as the Commission had interpreted it. The court preferred in that case, as it did in this one, a construction of the tariff which conformed to the manner in which the parties had interpreted it in practice. Also as in the present case, the Seventh Circuit approved the interpretation which allowed a *specific* tariff provision to take precedence over a *general* one, as the general provision would have completely nullified the tariff scheme involved in the specific one. In further support of its holding, the court in *National Van Lines* noted that the Commission's interpretation of the tariffs might result in a violation of law. It noted this, however, in conjunction with these other

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* The IHB incorrectly states in its petition that the Court of Appeals did not review the record before the Commission. This assertion is apparently based on a misinterpretation of the court's statement: "The conclusion of the district court to which we have just referred makes it unnecessary for us here to review in any detail the record or opinion of the Commission." It is obvious that the Court of Appeals in this statement is referring only to a review "here in our written opinion". That the Court did review the record and the opinion of the Commission is made abundantly clear by its numerous, specific references to both.

rules of tariff interpretation and, more importantly, with the benefit of the Commission's explicit admission that the Commission's interpretation would result in violations of the Interstate Commerce Act (315 I.C.C. at 542, 543).

Underlying the Commission's decision in *National Van Lines* is a critical factor which clearly distinguishes it from the Seventh Circuit's decision presently before this Court. In *National Van Lines,* the court emphasized that "although due weight should be accorded to the Commission's construction of a tariff," the particular circumstances before it did *not* involve "intricate facts of transportation" and deference to the Commission was not, therefore, necessary (355 F.2d 333). In direct contrast, the Seventh Circuit in the present case found that the situation before it involved matters "peculiarly within the competence of the Interstate Commerce Commission in the light not only of their [the tariffs] language but also of all the customs, practices and other underlying facts involved".

III

THE COURT OF APPEALS PROPERLY HELD THAT THE IHB DID NOT MAKE A SUFFICIENT SHOWING TO SUPPORT ITS CLAIM UNDER THE FIFTH AMENDMENT.

Before the Court of Appeals, the IHB made the argument that requiring it to comply with the provisions of its tariffs, as interpreted by the Commission, resulted in the unlawful taking of its property without compensation in violation of the Fifth Amendment. In its petition to this Court, the IHB incorrectly states that the Court of Appeals did not rule on this question and adds the related claim that the Commission's interpretation is unlawful because it requires "the rendering of free transportation without statutory authorization." Although this latter claim might properly be one for the Commission to consider in first instance, both assertions are completely invalid on the record in this case.

The movement of private freight cars to repair facilities without charge does not involve the performance of services without compensation. The line-haul and switching charges which the railroads collect on the commodities which move in freight cars are intended to compensate them for performing *all* the operations necessary to make such movements possible. These operations include moving empty freight cars to points where they can be loaded or to points where they can be repaired and returned to railroad service. Since the charges on loaded movements include compensation for the cost of necessary empty movements, the railroads are not permitted to assess an additional charge at the time those empty movements are made.

The fact that the cost of the empty movements of freight cars is a part of the cost of making loaded movements in those cars, and is, therefore, properly recovered through the charges on loaded movements was recognized by the Commission and the Courts in *Compensation for Transportation Service,* 332 I.C.C. 554 (1968); aff'd. sub. nom., *Southern Railway Company* v. *United States,* 306 F.Supp. 108 (E.D. Va. 1969). There the Commission rejected an attempt by the Southern Railroad to collect freight charges for making empty movements of freight cars owned by others. It concluded that (332 I.C.C. at 565):

> "Railroads historically move empty cars that have entered the national car fleet without compensation.
>
> "It is assumed that divisions of revenue derived from transporting loaded cars compensate for the movement of empties."

The Southern attacked the Commission's conclusion in an action before a three-judge federal court. It argued that its freight charges did not include compensation for the extraordinary empty movements which were involved and that, consequently, it was being forced to move those cars without compensation. The District Court rejected Southern's arguments and affirmed the Commission's order. It quoted

with approval the Commission's conclusions that "Railroads historically move empty cars that have entered the national car fleet without compensation" and that "It is assumed that divisions of revenue derived from transporting loaded cars compensate for the movement of empties" (306 F.Supp. 108, 114-115).

The requirement that the IHB make the repair movements of private freight cars without additional charge does not impose any burden upon it which is not borne by the other railroads. The record in this proceeding establishes that the requirement that repair movements be made without the exaction of a separate additional charge has been uniformly fulfilled by virtually all railroads for over fifty years. The car companies submitted evidence to the Commission which demonstrates that tens of thousands of repair movements are made each year and that virtually every railroad in the country participates in these movements. These railroads, without exception, are parties to tariff language virtually identical to that involved in this case. They include many switching lines as well as line-haul carriers that make repair movements without collecting or seeking to collect any charge (R. Item 15, Petitioner's Opening Statement, pp. 22-24).

There is absolutely nothing which distinguishes the IHB from the hundreds of other railroads which acknowledge and comply with the requirements of the mileage tariff. The IHB, like the other railroads, utilizes private freight cars to fulfill its transportation obligations and earns substantial amounts of revenue as a result. Privately-owned freight cars make thousands of loaded movements on the IHB from which the IHB collects hundreds of thousands of dollars in freight revenue each year.*

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* In *Cancellation of Private Car Allowances,* 322 I.C.C. 565 (1965), aff'd. 279 F.Supp. 270 (N.D. Ill. 1967), aff'd. per curiam 389 U.S. 88 (1967), the Commission specifically held, and this Court ultimately affirmed its conclusion, that nothing in the IHB's situation justifies exempting it from the mileage tariff obligations borne by all railroads resulting from the use of private cars.

If the IHB were permitted to assess charges on repair movements of privately-owned cars in addition to its charges on loaded movements, the shipper who provides his own car would be forced to pay twice for the same service. As noted, the published freight charges on loaded movements are designed to compensate railroads for the cost of repair movements. This is conclusively established by the fact that shippers who use railroad-owned cars pay only the published freight charge and do not pay an additional charge for the identical repair movements of these railroad-owned cars. An additional exaction for such movements of privately-owned cars would thus result in double payments for this service and would produce precisely the kind of discrimination which Section 2 of the Interstate Commerce Act prohibits. This is why the mileage tariff for years has provided that such empty movements of privately-owned freight cars will also be made without charge.*

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* The fact that railroads pay one another for empty repair movements off the line of the owning railroad is completely irrelevant to the issues here. These assessments, which are extremely rare, do not result in either discrimination or double payment. The railroads do not pay freight rates and their rules and obligations concerning the use of each other's cars are reciprocal—the effects of their application to the cars of one railroad are offset when that railroad applies the same rules to the cars of other railroads. In *Tank Car Allowances, Southern Ry. System*, 329 ICC 466, 478 (1967), the Commission recognized this distinction and specifically held that the rules relating to the handling of railroad cars are not indicative of the proper rules regarding private cars. Also, in *Louisville & Nashville R.R. Co.* v. *United States*, 282 U.S. 740 (1931), relied on by petitioner, this Court approved a decision by the Commission in which the Commission expressly distinguished between the lawful movement at less than tariff rates of executive office cars owned by the railroads and the lawful movement at no additional charge (above the freight rate) of empty, privately-owned cars which are designed and used for the production of revenue. This latter group of cars and the movements referred to by the Commission include precisely the ones involved in this case (Use of Passenger Train Cars, 155 I.C.C. 775, 787).

The tariff provision which imposes the obligation to make empty movements without charge does not distinguish between cars which are owned by shippers or cars which are leased by shippers. The tariff recognizes that in both cases the shipper who is providing his own car is paying a freight rate which assumes that a railroad-owned car will be provided. The portion of the railroad's transportation obligation which the shipper assumes when he provides his own car is the same, whether the car is leased or is owned by the shipper. The mileage tariff recognizes this by including leased cars, owned by car companies, as cars of private ownership within the scope of the tariff. The tariff, therefore, requires the railroads to make the same empty movements without charge in both cases.

The IHB's basic assertions in this regard, as well as the considerations noted above, were all before the Court of Appeals. In dismissing these claims, the Court cited the decision of this Court in *Baltimore & Ohio R.R. Co.* v. *United States,* 345 U.S. 146 (1953), which involved similar claims by railroads under the Fifth Amendment. In that case, this Court held "so long as rates as a whole afford railroads just compensation for their over-all services to the public the Due Process Clause should not be construed as a bar to the fixing of non-compensatory rates for carrying some commodities when the public interest is thereby served" (345 U.S. 150).

CONCLUSION

For the foregoing reasons, petitioner's request for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

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